IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1679

THE ESTATE OF THOMAS A. WILSON, EUGENE R. SPEER and THE UNION NATIONAL BANK OF PITTSBURGH, EXECUTORS,

Petitioners

v.

AIKEN INDUSTRIES, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COUNTER-STATEMENT OF THE CASE

Petitioners here seek a writ of certiorari to the Supreme Court of Pennsylvania from a final decision of that court in an equity action brought by Aiken Industries, Inc. ("Respondent") against the Estate of Thomas A. Wilson and its Executor, the Union National Bank of Pittsburgh ("Petitioners").

The Pennsylvania trial court held that Petitioners' decedent had breached his contractual and fiduciary obligations to Respondent and awarded damages to Respondent in the amount of $193,576.75, which award was affirmed by a court en banc. Petitioners appealed that judgment to the Supreme Court of Pennsylvania, which on January 31, 1978, entered a per curiam order stating, "The Court being equally divided with respect to the

question of appellant's liability, the decree below is affirmed."

In addition to this order, three of the Justices of the Pennsylvania Supreme Court concurred in an opinion in which they would have affirmed as to liability but would have remanded for a recalculation of Respondent's damages. The remaining three Justices filed separate opinions indicating that they would have reversed on the question of liability.

On February 13, 1978, Petitioners filed an Application for Reargument with the Supreme Court of Pennsylvania, a copy of which is attached hereto as Appendix "A".[1] Petitioner's Application was based solely on three contentions:

1. Since no member of the Pennsylvania Supreme Court agreed in toto with the judgment of the lower court, there would be a "patent miscarriage of justice" if the Supreme Court of Pennsylvania did not rehear the appeal.

2. The various opinions indicated a conflict among the Justices on the scope of appellate review of a Pennsylvania equity adjudication which would result in "confusion as to the Pennsylvania law on the scope of appellate review"; and

3. The various opinions also indicated a divergence of opinion among the Justices on the law of restrictive covenants so that the lower Pennsylvania

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1. Copies of the order of the Pennsylvania Supreme Court and the opinions of the individual Justices which were attached to that Application have been omitted herein because they are reproduced as an Appendix to the Petition for Writ of Certiorari.

Courts and the bar would be "without proper judicial guidelines on a legal question that recurs frequently."

Petitioners did *not* raise any Federal Constitutional or other Federal question in their Application for Reargument to the Supreme Court of Pennsylvania nor was any such raised or decided (or even involved) at any point in the Pennsylvania proceedings.

On April 11, 1978, the Supreme Court of Pennsylvania entered a per curiam order denying Petitioners' Application for Reargument, without opinion, a copy of which is attached hereto as Appendix "B".

Petitioners now seek a writ of certiorari to the Supreme Court of Pennsylvania claiming that its per curiam order of affirmance denied them due process.

REASONS FOR DENYING THE WRIT

I. There Was No Federal Constitutional Issue Involved, Raised Or Decided In The State Court Proceedings, Including Petitioners' Application For Reargument

This Court's decisions are clear that certiorari will not be granted where (as here) the alleged Federal question has not been previously raised or decided in the state court proceedings.

In *Cardinale v. Louisiana,* 394 U.S. 437, 22 L.Ed. 2d 398 (1969), this Court dismissed the writ of certiorari where it was determined at oral argument that the sole Federal question argued had never been raised or passed upon in the state court, stating:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Cromwell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller v. Nicholls,* 4 Wheat. 311, 315 (1819), and since, e.g., *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, 160-163 (1945); *McGoldrick v. Campagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940); *Whitney v. California,* 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis,* 20 Wall. 590 (1987)." *Id.* at 438, 22 L.Ed. 2d at 400.[2]

This undeviating rule has included cases involving allegations of due process violation. *Moore v. Illinois,* 408 U.S. 786, 799, 33 L.Ed. 2d 706, 716 (1972).

In *Bolln v. Nebraska,* 176 U.S. 83, 91, 44 L.Ed. 382, 385 (1900), this Court unequivocally expressed this principle:

> "We have repeatedly decided that an appeal to the jurisdiction of this Court must not be a mere afterthought, and that if any right, privilege, or immunity is asserted under the Constitution or laws of the United States it must be specifically set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

Ordinarily, the raising of a Federal question in a petition for rehearing in the state courts is itself too late to confer jurisdiction on this Court. *Rooker v. Fidelity Trust Co.,* 261 U.S. 114, 67 L.Ed. 556 (1923). *Mergenthaler Linotype Co. v. Davis,* 251 U.S. 256, 64 L.Ed. 255

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2. The cases cited reflect that this Court has consistently interpreted the statutes governing its jurisdiction over final judgments of state courts, from section 25 of the Judiciary Act of 1789, 1 Stat. 85 to the present 28 U.S.C. § 1257, as requiring that a Federal question be timely raised in the state courts.

(1920); *Simmerman v. Nebraska,* 116 U.S. 54, 29 L.Ed. 535 (1885); *Lagrange v. Chouteau,* 4 Pet. 287, 7 L.Ed. 861 (1830).

This Court has on occasion recognized an exception where the Federal question arose from some unanticipated ruling of the state court and the petition for rehearing presented the first opportunity to raise the issue. *Herndon v. Georgia,* 295 U.S. 441, 79 L.Ed. 1530 (1935); *Great Northern Railway Co. v. Sunburst Oil Co.,* 287 U.S. 358, 77 L.Ed. 360 (1932).

However, Petitioners did not even raise a Federal issue in their Application for Reargument following the Pennsylvania Supreme Court's per curiam affirmance based upon the divided views of the Justices of that court. Thus, they cannot come within the exception, because as this Court said in *Beck v. Washington,* 369 U.S. 541, 553-4, 8 L.Ed. 2d 98, 109 (1962):

> "Assuming *arguendo* that for the purpose of our jurisdiction the question would have been timely if raised in a petition for rehearing, not having been raised there or elsewhere or actually decided . . ., the argument cannot be entertained here under an unbroken line of precedent. E.g., *Ferguson v. Georgia,* 365 U.S. 570, 572 (1961); *Capital City Dairy Co. v. Ohio,* 183 U.S. 238, 248 (1902)."

Even assuming that Petitioners had raised a Federal question in their Application for Reargument, the denial of that application by the Pennsylvania Supreme Court *without* opinion precludes any grant of certiorari here. *Hanson v. Denckla,* 357 U.S. 235, 243-4, 2 L.Ed. 2d 1283, 1291-2 (1958); *Citizens Nat. Bank of Cincinnati v. Durr,* 257 U.S. 99, 66 L.Ed. 149 (1921); *Jett Bros. Distilling Co. v. Carrollton,* 252 U.S. 1, 64 L.Ed. 421 (1920); *Bilby v. Stewart,* 246 U.S. 255, 62 L.Ed. 701 (1918).

An alleged Federal issue here is a "mere afterthought", as in *Bolln, supra.*

II. Assuming Arguendo That A Federal Question Had Been Properly Raised And Decided In The State Proceedings, Affirmance By An Equally Divided Court Does Not Violate Due Process

The Pennsylvania Supreme Court affirmed the decision of the lower court because it was equally divided on the issue of liability. Under such circumstances, it is the universal rule that the decision of the lower court must be affirmed. 5 Am. Jur. 2d, Appeal and Error, § 902 at 338 (1962). Certainly such affirmance does not constitute a "miscarriage of justice" as contended by Petitioners—let alone a denial of Federal due process.

Indeed, this Court itself on numerous occasions has affirmed decisions by an equally-divided Court. See e.g., *Ohio ex rel. Eaton v. Price,* 364 U.S. 263, 4 L.Ed.2d 1708 (1960); *Etting v. Bank of the United States,* 11 Wheat, 59, 6 L.Ed. 419 (1826); *The Antelope,* 10 Wheat. 66, 6 L.Ed. 268 (1825). Such an affirmance also has long been held to be without precedential effect. *Ohio ex rel. Eaton v. Price,* 364 U.S. 263, 264, 4 L.Ed. 2d 1708, 1709 (1960).

The rationale and effect of this rule of affirmance was early set forth by this Court in *Durant v. Essex Co.,* 7 Wall. 107, 112, 19 L.Ed. 154, 157 (1869):

> "If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a

judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgement. *The legal effect would be the same if the appeal, or writ of error, were dismissed.*"[3] (emphasis added)

See also *Neil v. Biggers,* 409 U.S. 188, 34 L.Ed.2d 401 (1972).

Petitioners are not aided by the fact that the six Justices of the Pennsylvania Supreme Court chose to express their views by way of opinions. The effect of an affirmance by the equal decision of the court is the same as if the court had dismissed the appeal. *Durant, supra.* Those opinions are merely the expressions of the individual Justices who authored or joined in them and do not reflect any action by the court as a court. When members of this Court have expressed their views in separate opinions where the Court affirmed because it was divided, it has been acknowledged that "such an expression is unnecessary where nothing is settled." *Price, supra* at 264, 4 L.Ed.2d at 1709.

Finally, this matter is not the sort which warrants the granting of a writ of certiorari since it does not in-

3. The Pennsylvania Supreme Court has taken the same position with regards to the effect of an equal division in that Court. As stated in the leading Pennsylvania case on point, *First Congressional Dist. Election,* 295 Pa. 1, 12-13, 144 Atl. 735, 739 (1928) : "It is a universal rule that when a judicial or semi-judicial body is equally divided, the subject matter with which it is dealing must remain in statu quo." See also *Creamer v. Twelve Common Pleas Judges,* 443 Pa. 484, 489, 281 A.2d 57, 58 (1971).

volve "principles the settlement of which is of importance to the public as distinguished from that of the parties, . . . " *Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393, 67 L.Ed. 712, 714 (1923). See also *Rea v. Sioux City Cemetery,* 349 U.S. 70, 79, 99 L.Ed. 897, 904 (1955).

Here the issues are of importance only to the Petitioners who are dissatisfied with the outcome of the state court proceedings and there is no conflict of opinion and authority on the effect of affirmance by a divided court.

THE PETITION SHOULD BE DENIED

There is no Constitutional or other Federal issue here involved—none was raised in, or decided, by the Pennsylvania courts even on Petitioners' Application for Reargument or in the Pennsylvania Supreme Court's per curiam denial thereof.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied, at the cost of Petitioners.

Respectfully submitted,

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APPENDIX "A"

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

AIKEN INDUSTRIES, INC.,
Appellee,
v.
THE ESTATE OF THOMAS A. WILSON, EUGENE R. SPEER AND THE UNION NATIONAL BANK OF PITTSBURGH, EXECUTORS,
Appellants

No. 79
MARCH TERM,
1974

APPLICATION FOR REARGUMENT

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Appellants

APPLICATION FOR REARGUMENT

TO THE HONORABLE, THE JUSTICES OF
THE SUPREME COURT OF PENNSYLVANIA:

This Application for Reargument is based on three contentions:

1. Appellants appealed the lower court decision both as to liability and as to damages. Three Justices (Mr. Justices Roberts, Nix and Manderino) agreed with Appellants that there was no liability. Three Justices (Mr. Chief Justice Eagen and Mr. Justices Pomeroy and O'Brien) affirmed the liability portion of the lower court decision but agreed with Appellants that the lower court had applied an improper measure of damages. *Thus, the entire Court (former Mr. Chief Justice Jones did not participate) agreed that the lower court award should be vacated but incomprehensibly the Per Curiam Opinion affirmed the decree of the lower court.* If reargument is not granted, there is a patent miscarriage of justice.

2. The four opinions on liability indicate a substantial conflict of opinion among the Justices on the scope of appellate review of an equity adjudication. Three Justices were of the opinion that a limited review was appropriate and three Justices felt that the chancellor's conclusions were subject to general review. If this case is not reargued to the end that a majority opinion may eventuate, there will be confusion as to the Pennsylvania law on the scope of appellate review.

3. The four opinions on liability indicate a substantial divergence of opinion among the Justices on the law of restrictive covenants in Pennsylvania so that the

lower courts and the bar are without proper judicial guidelines on a legal question that recurs frequently. It is respectfully submitted that the matter warrants reconsideration by the entire Court so that either the opinions by Mr. Justice Nix and by Mr. Justice Manderino or the opinion by Mr. Justice Pomeroy will become the settled law of Pennsylvania.

I. PRELIMINARY STATEMENT

The lower court entered a decree against Appellants in the amount of $196,576.75.

Appellants appealed on the basis that there had been no breach of the restrictive covenant and alternatively, even if there had been, the lower court applied an improper measure of damages.

Mr. Justice Pomeroy wrote an Opinion In Support of Affirmance and Modification joined in by Mr. Chief Justice Eagen and Mr. Justice O'Brien (hereinafter "Pomeroy Opinion"). The Pomeroy Opinion found liability but would vacate the lower court decree so that damages could be recalculated in accordance with the views in the Pomeroy Opinion. The Pomeroy Opinion found duplication of damages in the lower court award and additionally determined that damages should have been based on net profits and not on gross profits.

The Opinions In Support Of Reversal of Mr. Justice Manderino, of Mr. Justice Nix and of Mr. Justice Roberts did not touch on damages since they found no liability.

II. REASONS RELIED ON THE ALLOWANCE OF REARGUMENT

A. The Per Curiam Opinion (Appendix "B" hereto) affirms the decree below on the basis that the Court was equally divided on the question of liability. The Per Curiam Opinion overlooks the fact that all six Justices who participated in the decision were of the opinion that the decree of the court below should be vacated although for different reasons. Because the Justices were equally divided on liability is no reason to affirm a lower court decree with which each of the six Justices disagreed. Appellants are in the intolerable position of having to pay a lower court award when Mr. Justices Manderino, Nix and Roberts are of the opinion that Appellants are not liable at all, and Mr. Chief Justice Eagen and Mr. Justices O'Brien and Pomeroy are of the opinion that the lower court improperly calculated the amount of damages. In the present posture, Appellants would have been infinitely better off if Mr. Justices Manderino, Nix and Roberts would have joined in the Pomeroy Opinion against Appellants rather than filing opinions in favor of Appellants. The mere statement of the proposition is indicative of its incongruity.

B. The Pomeroy Opinion (Appendix "F" hereto), unlike the opinion by Mr. Justice Manderino (hereinafter the "Manderino Opinion") and the opinion by Mr. Justice Nix (hereinafter the "Nix Opinion"), found that there was substantial evidence to support the lower court's findings and that the lower court's finding of fact, if supported by adequate evidence, would not be disturbed on appeal.

The Pomeroy Opinion, it is respectfully submitted, overlooks the point that there was no dispute with respect to the material facts in this case and that the appeal was from the chancellor's conclusions which, whether of law or fact, are no more than his reasoning from the underlying facts. The Manderino Opinion (Appendix "E" hereto), citing *Van Products Co. v. General Welding and Fabricating Co.*, 419 Pa. 248, 257, 213 A.2d 769, 774 (1965), found that the chancellor's conclusions were reviewable. The Nix Opinion (Appendix "D" hereto) held that this Court need not give deference to the legal conclusions of the chancellor.

Thus, three Justices made a limited review of the conclusions below and three Justices, those who found no liability, made a complete review.

The Pomeroy Opinion on the scope of review is contrary to *Van Products, supra,* and to *Felmlee v. Lockett,* 466 Pa. 1, 351 A.2d 273 (1976) cited in the Manderino Opinion; the *Felmlee* case opinion was by former Mr. Chief Justice Jones who did not participate in the consideration or decision of this case.

The scope of review question is obviously critical. If this Court is now saying that there should be only a limited review of the chancellor's conclusions (as distinguished from his findings of fact), there will in the future be few successful appeals from equity adjudications. If this Court is now modifying the rule in *Van Products, supra,* it should be done by the full Court and not by three Justices. Unless this case is reargued so that a majority opinion may resolve this conflict among the Justices, the Pennsylvania law on the scope of appellate review of an equity decision is most uncertain.

C. The four liability opinions indicate a fundamental conflict among the Justices as to the law of restrictive covenants. The Opinion In Support Of Reversal by Mr. Justice Roberts, the Manderino Opinion and the Nix Opinion restated the familiar principle of law that contracts in restraint of trade should be strictly construed and that any conduct not specifically proscribed by the restrictive covenant language is not violative of the covenant. The Pomeroy Opinion, without citing a single case on liability, concluded that "the covenant is breached if the covenantor knowingly engages in activity the necessary effect of which will be to foster, if not instigate, competition."; there is no judicial precedent for such a far-reaching and novel statement. The Pomeroy Opinion ignores the hitherto well-settled rule of law that a non-competition covenant is violated only if the covenantor engages in conduct which is forbidden by the non-competition covenant.

The Pomeroy Opinion in effect holds that it makes no difference whether a non-competition covenant is broad or narrow and that it makes no difference what specific types of conduct are proscribed by the covenant. If the covenantor engages in *any* activity which fosters competition he is in violation of his covenant, no matter what the covenant says. This holding may create substantial problems for the Court in future cases.

III. CONCLUSION

It is most unsatisfactory for the litigants, the lower courts, the bar and businessmen in the Commonwealth to have the important issues raised by this appeal dangling. The only practicable solution is to have the appeal reargued so that a majority opinion may resolve these issues.

Respectfully submitted,

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Attorneys for Applicants-
Appellants

APPENDIX "B"

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

SALLY MRVOS
Prothonotary
IRMA T. GARDNER
Deputy Prothonotary

801 City-County Building
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April 17, 1978

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In Re: Aiken Industries, Inc. v. The Estate of Thomas A. Wilson, et al, Appellants
No. 79 March Term, 1974

Gentlemen:

The Court has entered the following Order on your Application For Reargument, in the above matter:

"Petition denied this 11th day of April, 1978.

Per Curiam"

Very truly yours,

IRMA T. GARDNER
Deputy Prothonotary

ITG:ban
cc: Walter T. McGough, Esquire
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